

DOMESTIC RELATIONS

FAILURE OF HUSBAND TO PAY ALIMONY PROVIDED FOR IN SEPARATION AGREEMENT INCORPORATED IN A DIVORCE DECREE — CONTEMPT

On Dec. 31, 1927, a decree of alimony was granted Mrs. Holloway. She was allowed, per month, \$50.00 for each child and \$125.00 for her own support. This decree was based upon a separation agreement entered into by the husband and wife before they began litigation. The agreement was incorporated in the decree for alimony. The husband defaulted in his payments. In a contempt proceeding he was ordered to jail. He appealed, claiming his constitutional rights to be exempt from imprisonment for debt. The supreme court held, quoting the syllabus, "Contempt proceedings lie against a husband for failure to pay alimony as provided in a separation agreement which is incorporated into and made a part of the divorce decree." *Holloway v. Holloway*, 130 Ohio St. 214, 4 Ohio Op. 156, 198 N.E. 579 (1935).

To reach this conclusion it was necessary for the court to dispose of the contention of the defendant that alimony was a debt, imprisonment for which is forbidden by the Ohio constitution, Article 2, Sec. 15, "No person shall be imprisoned for debt in any civil action, or mesne or final process, unless in cases of fraud." The authority to decree alimony is given the court by Oh. G.C. Sec. 11991 and correlative statutes. "Such alimony may be allowed in real or personal property or both, or by decreeing to her such sum of money payable in gross or installments as the court deems equitable." Oh. G.C. Sec. 12137 gives the court the power to punish for contempt "disobedience of, or resistance to a lawful writ, process, order, rule, judgment or command of the court or officer." In the principal case the court reasoned "the right to alimony does not arise from any business transaction, but from the relation of marriage. It is not founded upon a contract express or implied, but on the natural or legal duty of the husband to support the wife. It is the law rather than the contract which imposes the obligation on the husband." From this rationalization it concludes in accordance with the great weight of authority that the husband can be imprisoned for non-payment of alimony. 19 Corpus Juris 282, Sec. 645, 646; Miller's Equity 303, 304; 2 Bishop on Marriage and Divorce, Par. 1092, 837; Schouler on Marriage and Divorce (6th edition), Par. 1843, 1850, 1853, 1851; 30 A.L.R. 130.

Although a great majority of courts have followed this rule they base it upon three entirely different major premises: first, as is followed

by the principal case, "A judgment order or decree for the payment of temporary alimony possesses different characteristics than an ordinary debt. . . . It is designed to secure the performance of a legal duty in which the public has an interest." *Cain v. Miller*, 191 N.W. 704 (Neb.), 30 A.L.R. 125 (1922); second, "It is an allowance in the nature of a partition of the husband's property of which the wife is entitled to a reasonable share for her maintenance." *West v. West*, 126 Va. 696, 101 S.E. 876 (1920). "The nature and effect of such a decree is the same as that of a court of equity for the specific performance of any other act." *Lynon v. Lynon*, 21 Conn. 184 (1851); third, "The imprisonment is not ordered simply to enforce the payment of the money but to punish for the wilful disobedience of a proper order of the court." *West v. West*, *supra*; *accord*, *Staples v. Staples*, 87 Wis. 592, 58 N.W. 1036 (1894).

As a general rule the courts in reaching the conclusions above, have not taken cognizance of the fact that all alimony is not of the same character. Upon examination of the cases it is revealed that courts have awarded several types of alimony, e.g., temporary, pendente lite, alimony payable in installments, gross alimony payable in installments, and gross alimony payable in a lump sum. The weight of authority holds that contempt will be for default in any of these types, but Ohio decisions distinguish them. Since the principal case has ignored this unique Ohio position, in order to understand the Ohio attitude, it is necessary to examine the prior Ohio cases in the light of the types of alimony for which contempt is permitted and their influence upon the major premises above.

For facilitating the discussion of this problem the Ohio cases as well as related cases may be divided into three categories classified as to the court's inclination to invoke relief by contempt in the specific type of alimony decree with which it is confronted.

First group: Decrees for pendente lite, temporary and alimony payable in installments, *Kaderabek v. Kaderabek*, 3 Ohio C.C. 419, 2 Ohio C. Dec. 236 (1888); *Stewart v. Stewart*, 10 Ohio Dec. Reprint 662 (1889); *Effinger v. State of Ohio*, 11 Ohio C.C. 389, 5 Ohio C. Dec. 408 (1896); *Lumbering v. State of Ohio*, 19 Ohio C.C. 658 (1900). In such types of cases it is not difficult to find justification for contempt proceedings because a duty can easily be inferred and the court still has jurisdiction of the parties. *Stewart v. Stewart*, *supra*, merits particular examination. In arriving at its decision, the court drew a distinction between its conclusion and that of a differently minded Missouri court, *Coughlin v. Ehlert*, 39 Mo. 285 (1866), in which case it was held

that there could be no imprisonment for debt arising out of alimony. The Ohio court argued that their holding was not opposed to the Missouri doctrine because theirs was a case of temporary alimony and the Missouri court's was one of permanent alimony. Such a distinction is significant in that it raises the question as to what is the true nature of a permanent decree of alimony. This question has never been settled in the State of Ohio by the court of last resort.

Second group: decrees for gross alimony payable in installments, *Myers v. Myers*, 3 O.N.P. 162 (1896); *Cook v. Cook*, 66 Ohio St. 566, 58 L.R.A. 625, 64 N.E. 567 (1902); *Hoffman v. Hoffman*, 8 Ohio C.C. (N.S.) 550 (1906); *Re Frisbie*, 27 Ohio App. 290, 6 Ohio Abs. 420 (1927). These cases involve a more difficult problem in ascertaining the right of a court to enforce by contempt. They raise the question, after there has been a justification for contempt proceedings upon the ground of duty, as to whether the court still retains jurisdiction after the awarding of alimony, and if it does, does the amount awarded in gross alimony exceed the amount which is owed the wife as a duty? *Myers v. Myers* decides the first question in the affirmative. The court claims that the decree is not a final judgment, but "an order of the court legally and lawfully made" and can therefore be punishable by contempt. *Hoffman v. Hoffman* allows the theory of duty to suffice. The court in *Cook v. Cook*, the leading case in Ohio on the subject of contempt for default in alimony payments, in order to answer the questions, started out upon the theory of duty. Alimony, the opinion reads, "is not a debt in the sense of pecuniary obligation; it arises from a duty which the husband owes the public as well as the wife; but it is not upon any specific contract, nor is the proceeding in which the adjudication is had a civil action." However, the court found differently in rationalizing attachment for contempt for non-payment of alimony over the amount which the court usually awards the wife for support on the theory of a husband's duty to support the wife. Mr. Justice Spear, on this point says, "Beyond this [duty owed by husband to the wife] the provision for alimony is an allowance. It is in the nature of a partition." He considers the assets of the husband as "accumulations which are presumably the result of the joint effort and joint economies" of the husband and wife. As a result the decree rendered considers this fact as well as the property "which may have come to the husband by marriage." He adds "the law wisely awards the wife a just and equitable portion in real or personal property or both or money payable in gross installments." He reasons that alimony is not a debt to the wife nor damages but part of the estate in which she has a share. It follows, then,

that "withholding this allowance" can be punished by contempt "for the same reasons and upon the same ground that orders and decrees of the court of equity in injunction and the like are enforced." Such a conclusion would allow the enforcement of the decree by contempt even if it were not based upon the theory of duty, that is, if the court still has jurisdiction. This can be granted because the alimony to be paid is to be paid in installments, by an order of the court. This court seems then to draw a fine distinction between alimony as a support for the wife and alimony as a share of the husband's assets.

Third group: decrees for gross alimony payable in a lump sum; *Hart v. Hart*, 1 O.N.P. 56, 1 Ohio Dec. 94 (1894); *In Re Whallon*, 6 Ohio App. 80, 26 Ohio C.C. (N.S.) 167 (1915). This type has not been considered in a supreme court decision in Ohio. *In Re Whallon* the court allowed the imprisonment, but did not discuss its reasons, its conclusion being based upon *Cook v. Cook*, *supra*, and *Lumbering v. State of Ohio*, *supra*, neither of which can be used to support the decision. On the other hand *Hart v. Hart* stands for the opposite proposition. Ohio Jurisprudence has adopted this view, 9 Ohio Jur. 99: "But it is not consistent with Ohio legislation upon the subject of divorce and alimony judgments and orders to enforce the payment of judgment for money in gross by contempt proceedings." This statement is questionable in that it is still undecided by the Supreme Court. Judge Ong in *Hart v. Hart* constructs his argument upon the proposition that a decree in gross is a final judgment and not an order of the court, Oh. G. C. 11582, "A judgment is the final determination of the rights of a party in an action. A direction of a court made or entered in writing and not included in a judgment, is an order," therefore the court can not be clothed with jurisdiction to direct the payment of the judgment or in default commit for contempt. He reasons further that the Ohio legislature has provided another remedy for the enforcement of all judgments for payment for money only, which is in addition to execution when the execution is returned unsatisfied. "Proceedings may be instituted under our statutes called a proceeding in the aid of execution, where a full and complete investigation can be had, the husband required to disgorge and expose all his property that he might have therefore concealed from execution and his failure to comply with the order of the court to appear and thus submit to an examination, may be summarily dealt with and punished as of contempt." The judge concludes, therefore, it is not in harmony with legislative intent to enforce alimony in gross by contempt.*

* It is significant to note that J. Ong decided the case of *Myers v. Myers*, which was a case of alimony in gross payable in installments in which was allowed imprisonment for contempt.

For the consideration of other Ohio cases which may reflect light upon the statements of *Hart v. Hart*, an Indiana case in point, *Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1903) affords a point of departure. This court does not permit a decree for alimony in gross to be enforced by contempt, but it declares it must be enforced by execution. The court terms alimony named by statute "an allowance." It is not the alimony of common law, which existed until the death of the husband based upon the fact that marriage existed until death. It is alimony under a statute and is only an equitable settlement between the parties. Such gross allowance is given "on the theory that thenceforth the parties were to be strangers to each other." Similar conclusions are reached in an early Ohio case, *Petersine v. Thomas*, 28 Ohio St. 596 (1874). This was a case in which the wife wanted to increase her gross alimony. It concludes that the statute contemplates a final separation in divorce. The parties are "to each other as strangers." When the discretionary power of the court has been fully exercised the case is at an end, "exhausted" and where she is given a divorce and alimony in gross she is deemed to have the just and equitable share of her husband's estate. However, the court recognizes that it may decree alimony in installments and modify the decree at a future time. This case infers, then, that alimony in lump sum is a final judgment. This is the first step in the solution of the problem raised in the *Hart* case. From other Ohio cases bearing upon this subject, the same conclusion can be drawn: *Cooper v. Cooper*, 24 Ohio St. 488 (1874). This case held that the claim of the wife for alimony in gross was that of "a judgment creditor." *Olney v. Watts* 43 Ohio St. 499, 3 N.E. 354 (1885) held that a party receiving alimony in gross payable in installments may obtain a modification of the decree. *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N.E. 471 (1887), followed the *Olney* case but it involved the modification of a decree for support of a minor child. *Conrad v. Everich*, 50 Ohio St. 476, 35 N.E. 58, (1893), in which it was contended by the plaintiff that alimony in gross was not a debt, held, nevertheless, that a decree will operate per se as lien on lands. In addition it considered a duty to be the foundation of the debt. *Cook v. Cook*, 66 Ohio St. 566, quotes this case stating that it is not authority for the proposition that alimony is a debt. This court interprets this case to mean that a wife not only has the remedy of contempt but also all the remedies of an ordinary debtor. In *Julier v. Julier*, 62 Ohio St. 90, 56 N.E. 661 (1900), a case involving the payment of gross alimony in installments, the opinion stated "The judgment cannot be impeached, except by direct proceedings to reverse or annul it"; *Law v. Law*, 64 Ohio St.

369, 60 N.E. 560 (1901), held that where alimony is adjudged to a wife on a separation agreement it cannot be modified after term. The court considered the case of *Olney v. Watts*, *supra*, and quoted with approval *Petersine v. Thomas*, *supra*; *DeWitt v. DeWitt*, 67 Ohio St. 340, 66 N.E. 136 (1902), approves *Petersine v. Thomas*. (This decision was concurred in by Justice Spear who wrote the opinion in the *Cook* case); *Hassaurek v. Maikbreit*, 68 Ohio St. 554, 67 N.E. 1066 (1903), required the husband's estate to pay alimony in installments, as set out in an agreement incorporated in a decree, for the life of the wife. The court quoted with approval *Petersine v. Thomas*, *Julier v. Julier*, and *Law v. Law*, *Fickel v. Granger*, 83 Ohio St. 101, 93 N.E. 527 (1910) stood for the proposition that the wife's creditors previous to marriage separation have no claim on the alimony paid to the wife, holding that "It is not the property of the wife recoverable as debt, damage, or penalty." *Gilbert v. Gilbert*, 83 Ohio St. 265, 94 N.E. 44 (1911), stated "A decree for alimony payable in installments in a suit for alimony alone in one state will not support an action as a final judgment for a fixed sum of money in another state." It "was not a judgment in the strict meaning of the term, but was such an order as was continuously subject to modification." In *Clough v. Long*, 8 Ohio App. 420, 28 Ohio C.C. (N.S.) 423 (1918), it was held "When a gross sum is allowed the courts generally recognize it as in full satisfaction of all claims, and regard the award so made as final; and the awarding court's jurisdiction at an end. *Plaster v. Plaster*, 47 Ill. 290, *Stratton v. Stratton*, 73 Me. 481, *Mitchel v. Mitchel*, 20 Kan. 665, *Kamp v. Kamp*, 59 N.Y. 212." It also held that the court has no jurisdiction to modify at a subsequent term: *Meister v. Day*, 20 Ohio App. 224, 151 N.E. 736 (1925), concluded that alimony for a fixed sum payable in installments will not support an action for a money judgment. By dictum the court said the remedy is to seek modification of the order for alimony by reducing it to a lump sum. If the reasoning of this court were followed, the only remedy for payment of alimony in installments would be by contempt, since it can not be sued upon as a debt. This case would also lead to the conclusion that alimony payable in a lump sum was a debt: *Corbett v. Corbett*, 36 Ohio App. 321, 173 N.E. 316 (1930) by dictum stated that the court has power to modify payments in installments because it has continuing jurisdiction. It is apparent, therefore, that there is authority for the assumption that an award for alimony in lump sum is a final judgment over which the court has lost jurisdiction to deal with further. It follows, therefore, that there can be no imprisonment for default, and the *Hart* case is substantiated.

Upon the precise subject of alimony payable in lump sum there has been no decision in the country directly in point, except the Indiana case cited and a Tennessee case. The decree in that case was for \$32,800. This court declared that there were better reasons for employing contempt in the case of gross alimony than in cases of other types of alimony, "for judgment for alimony in gross is made upon the finding of the court of the present value of the husband's property," and the husband having such ability should be judged contemptuous if he refuses to pay, *Brown v. Brown*, 4 S.W. (2nd) 345 (1928). This court quotes *Cook v. Cook*, *supra*, which, as has been shown, is not in point. It also cites *Lyon v. Lyon*, 21 Conn. 184 (1853). That case decides that the decree is similar to a decree for partition and therefore can be enforced by contempt. However, the Tennessee court does not consider the argument that when the court has given alimony in a lump sum it loses jurisdiction and therefore can not enforce by contempt. The court does make the statement, nevertheless, that the contempt "is merely a supplemental process by which the court endeavors to enforce its judgment." To substantiate its conclusion it quotes from a United States Supreme Court case, *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390, 25 Sup. Ct. Rep. 172 (1904), in an opinion written by Justice Day. In this case the plaintiff insisted, since there was no reservation of right to change or modify the decree, it was an absolute judgment beyond the power of the court to alter or amend and therefore should be discharged in bankruptcy proceedings. The court quotes *Audubon v. Shiefeldt*, 181 U. S. 575, 45 L. Ed. 1009, 21 Sup. Ct. Rep. 735 (1901), for the proposition that alimony is founded on the natural and legal duty of the husband to support the wife. Justice Day agrees and proceeds one step farther and concludes that the fact that alimony is a final judgment does not change this essential character of the liability or determine that a claim for alimony is a debt arising out of contract. "The court having power to look behind the judgment, to determine the nature and extent of the liability, the obligation enforced is still of the same character, not withstanding the judgment." The conclusion follows that if one looks behind the judgment and finds the duty, even though it is a final judgment, it is not a debt arising out of contract. A court might conclude as did the Tennessee court then that alimony in lump sum not being a contract debt can be enforced by contempt. *Second National Bank of Sandusky v. Becker*, 62 Ohio St. 289, 56 N.E. 1025, 51 L.R.A. 860 (1900).

On all types of alimony the Missouri courts are *contra* to the doctrine that there can be imprisonment for default, *Coughlin v. Coughlin*,

supra; *McMakin v. McMakin*, 68 Mo. App. 57 (1896); *In re Floyd Kinsolving*, 135 Mo. App. 631, 116 S.W. 1068 (1909); *Francis v. Francis*, 192 Mo. App. 710, 179 S.W. 975 (1915).

In summary, the majority of the courts of the country permit attachment for contempt upon default regardless of the type of alimony awarded. They invoke the following theories: (1) disobedience of a legal duty, (2) disobedience of a final equitable decree, (3) disobedience of an order of the court. Missouri courts are *contra*. Indiana is *contra* as to payment of gross alimony in lump sum upon the theory of legislative intent. Ohio is in accord with the majority as to all types of alimony except alimony in lump sum. This type has not yet been the subject of a supreme court decision. In considering this problem the court has a choice between the alternatives, (1) alimony in lump sum is a final judgment over which the court has lost jurisdiction, therefore it has no power to punish the defaulter in contempt proceedings, (2) assuming alimony in lump sum is a final judgment, the court will look behind the judgment, see the duty, take jurisdiction and enforce by imprisonment.

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EVIDENCE

JUDICIAL NOTICE OF A CITY ORDINANCE — STATUS IN REVIEWING COURT

In the original action, a suit to replevy an automobile, the Municipal Court of Cincinnati took judicial notice of Section 74-136 of the ordinances of Cincinnati. On petition in error, the Court of Appeals for Hamilton County, in affirming the judgment of the Court of Common Pleas, stated that the original trial being in the Municipal Court, the city ordinances were matters of which that court and all succeeding courts considering the case must take judicial notice. *Jackson v. Cope-lan*, 50 Ohio App. 414, 198 N.E. 596, 3 Ohio Op. 223, 19 Abs. 663 (1935).

One group of jurisdictions in the United States has held that a reviewing court which would not in an original action take judicial notice of a municipal ordinance, will not take judicial notice of the ordinance on reviewing a judgment of a court which did take judicial notice thereof, unless authorized by statute to do so. Otherwise, the ordinance can be made known to the court only by being made a part of the record. *State v. Egli*, 41 Idaho 422, 238 P. 514 (1925);